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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.H. et al., Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.H.,

Defendant and Appellant.

E056215

(Super.Ct.No. RIJ119641)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant
and Appellant.

Pamela J. Walls, County Counsel, and Carole A. Nunes Fong, Deputy County
Counsel, for Plaintiff and Respondent.

Defendant and appellant M.H. (mother) appeals from the juvenile court's order under Welfare and Institutions Code section 366.26¹ terminating her parental rights to her daughters, then 15-year-old S.H., and then 18-month-old R.T. Mother raises two claims of error. First, she contends, because she had just entered a residential treatment program to address her drug dependency, and therefore was working on her reunification plan, the juvenile court erred when it terminated her reunification services at the 12-month review hearing. Next, mother contends the juvenile court abused its discretion when it denied her section 388 petition. We disagree with both claims and therefore will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are undisputed. On April 15, 2010, Riverside County Department of Public Social Services (DPSS) removed S.H. from mother's custody after mother hit the child in the left eye while the two were arguing. On April 19, 2010, DPSS filed a section 300 petition that alleged that 13-year-old S.H. was at risk of serious physical harm within the meaning of section 300, subdivision (b), due to physical abuse by mother, and domestic violence between mother and R., mother's live-in boyfriend (who is not the father of S.H.). DPSS filed an amended section 300 petition on April 26, 2010, that added allegations regarding six-month-old R.T., namely, that mother and R., who is R.T.'s father, abuse methamphetamine in the home and are under the influence of that

¹ All further statutory references are to the Welfare and Institutions Code unless indicated otherwise.

drug while caring for R.T.² At a hearing on April 27, 2010, the juvenile court detained both girls and removed them from mother's custody.³

According to the social worker's report for the jurisdiction and disposition hearing, mother uses methamphetamine and acknowledged that she first used drugs when she was 15 years old. Mother's older child, S.H., has lived most of her life with a relative. When the relative died in August 2009, S.H. came to live with mother. According to mother, S.H. has had a difficult time making the transition. Mother acknowledged that she and R.T.'s father engage acts of domestic violence with the child present and that both have used methamphetamine in the home.

At the combined jurisdiction and disposition hearing, the juvenile court found the allegations of the amended petition true with respect to both R.T. and S.H. The court removed both girls from mother's physical custody and ordered that she participate in reunification services as set out in her case plan.

By the time of the six-month review hearing on December 9, 2010, mother had completed an outpatient substance abuse program, was regularly visiting the children, and was making great strides toward recovery. Eventually, the girls had unsupervised

² The social worker's report for the detention hearing on the amended section 300 petition also disclosed that mother was four months pregnant with her third child. When that child was born, DPSS took her into protective custody and she is the subject of a separate dependency proceeding. (See case No. E054617.)

³ Although the petition includes allegations regarding R.T.'s father, he is not a party to this appeal. Therefore, we will not mention him in our recitation of the facts or in our discussion.

weekend visits with mother. The juvenile court ordered services to continue and set the 12-month review hearing for June 9, 2011.

On March 29, 2011, mother tested positive for methamphetamine. Mother asked the social worker for a referral to inpatient substance abuse treatment. The social worker submitted mother's application and as a result mother was placed on a five week waiting list for residential treatment. On May 4, 2011, she was dropped from the Alternatives to Domestic Violence program due to her excessive absences. In the report for the 12-month review hearing, the social worker recommended that the juvenile court terminate reunification services and set a selection and implementation hearing for both girls. S.H. had been living with a maternal aunt and had stated early on that she did not want to return to live with mother. Although R.T. initially was placed in foster care, in January 2011 she was moved to the home of a paternal uncle and aunt and was living with them at the time of 12-month review hearing.

Mother was not in court for the 12-month review hearing on June 9, 2011. Her attorney reported that mother had entered an inpatient drug treatment program. Mother's attorney asked "to have this matter set" for August 10, 2011. The juvenile court declined and instead continued the hearing to June 13, 2011.

At the hearing on June 13, mother's attorney again asked for a continuance because she had not been able to contact mother. The court denied that request. Mother's attorney then asked the juvenile court not to terminate mother's reunification services and instead to continue services so that mother could complete her inpatient

treatment program. The court denied that request. Instead, the court terminated reunification services with respect to both R.T. and S.H. after finding that DPSS had prepared a case plan and provided reasonable services to mother, and that mother had not made satisfactory progress toward alleviating or mitigating the causes that led to placement and had not completed her case plan. The court set the section 366.26 selection and implementation hearing for October 11, 2011.

Mother filed a motion under section 388 on October 7, 2011, in which she alleged her circumstances had changed because on August 31, 2011, she had completed a 90-day residential drug treatment program and has been participating in outpatient treatment. Mother asked the juvenile court to vacate the section 366.26 hearing and return the children to her custody or reinstate reunification services. The court denied that motion after conducting a hearing, the details of which we recount below, in our discussion of this issue. The juvenile court then conducted the section 366.26 hearing and terminated mother's parental rights with respect to both R.T. and S.H.

DISCUSSION

We first address mother's claim that the juvenile court abused its discretion by denying her continuance request and terminating her reunification services. Although she did not challenge either order in the statutorily prescribed manner (see Welf. & Inst. Code, § 366.26, subd. (1)(2)), she contends she has not waived the issue because the juvenile court mailed the writ advisement to the wrong address. DPSS does not address this aspect of mother's claim. We construe that silence as a concession that mother's

assertion is correct and that she is not precluded from raising the issue on appeal.⁴ That concession is appropriate.

1.

ORDER TERMINATING REUNIFICATION SERVICES

As previously noted, mother was not in court for the 12-month review hearing on June 9, 2011. Her attorney reported that mother had entered an inpatient drug treatment program. Although mother's attorney apparently did not know any details at the time of the hearing, a later social worker's report states mother entered the program on May 31, 2011. Mother's attorney asked "to have this matter set" for August 10, 2011. The juvenile court declined to continue the hearing for that length of time, and instead granted a continuance to June 13, 2011.

At the hearing on June 13, mother's attorney told the court that she had not heard from mother although she had left a message at mother's substance abuse treatment program in Pittsburgh, California, asking mother to contact her. Mother's attorney speculated that mother might be precluded by her treatment program from having outside contact. But whatever the explanation, her attorney requested a continuance so that she could speak with mother. The court denied that request.

⁴ At the very least, the clerk's notice of advisement is ambiguous because mother's correct current mailing address in Pittsburgh is crossed out and her former address in Riverside is handwritten in, which suggests the clerk mailed the notice to the old address.

Mother's attorney then asked the juvenile court not to terminate mother's reunification services and instead continue services so that mother could complete her inpatient treatment program. The court denied that request and then terminated mother's reunification services with respect to both R.T. and S.H., after finding that DPSS had prepared a case plan and provided reasonable services to mother, and that mother had not made satisfactory progress toward alleviating or mitigating the causes that led to placement and had not completed her case plan. The juvenile court set the section 366.26 selection and implementation hearing for October 11, 2011.

Mother contends it was an abuse of discretion, and a violation of her right to due process, for the court to deny her continuance request and to terminate her reunification services because at the time of the 12-month review hearing mother was in a residential drug treatment program, but the social worker failed to advise the juvenile court of mother's progress in that program. We disagree.

The state and federal constitutional rights to procedural due process are implicated when a person is denied notice or a meaningful opportunity to be heard. (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 412 [““The fundamental and crucial right to ‘conceive and raise one’s children’ is protected by due process guaranties. [Citations.] ‘[T]he interest of a parent in the companionship, care, custody, and management of [her] children is a compelling one, ranked among the most basic of civil rights [citations], [and] the state, before depriving a parent of this interest, must afford [her] adequate notice and an opportunity to be heard.’ [Citation.]” [Citations.]”].)

Mother was present when the court set the 12-month review hearing for June 9, 2011. Therefore, she does not dispute that she received notice of that hearing. Although mother did not attend, she was represented by her attorney at both the originally scheduled and the continued hearing. Moreover, mother's failure to appear was not the fault of either DPSS or the court. In short, mother's due process claim is meritless.

We review the court's ruling on both the continuance request and the order terminating reunification services under the abuse of discretion standard. More particularly, "Section 352 provides that a continuance shall be granted only on a showing of good cause and shall not be granted if it is contrary to the minor's best interests. '[T]he court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.' (§ 352, subd. (a).) Continuances are discouraged [citation] and we reverse an order denying a continuance only on a showing of an abuse of discretion [citation]." (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.)

Mother's attorney asked the juvenile court to continue the 12-month review hearing so that she could speak with mother. When the court denied that request after noting it had already granted one continuance for that purpose, mother's attorney asked the court to "continue out services" so mother could complete her 90-day residential drug treatment program.

At the time of the 12-month review hearing, mother had been in the residential treatment program for 10 days, as county counsel points out. At best, the social worker could have reported that mother was in a residential treatment program, but it would have been too soon to report on any meaningful progress. Moreover, the court knew that mother was in treatment because her attorney had told the court and had requested a continuance based on that fact. We simply cannot say it was an abuse of the court's discretion to deny mother's second continuance request. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180 ["Discretion is abused when a decision is arbitrary, capricious or patently absurd and results in a manifest miscarriage of justice."].)

With regard to reunification services, under section 366.21, subdivision (g)(1), the juvenile court could continue the case for six months beyond the date of the 12-month review hearing for S.H. and the six-month review hearing for R.T. only if it found a substantial probability that R.T. and S.H. "will be" returned to mother within six months, and the court may make the substantial probability finding only if it also finds the three factors set forth in subdivision (g)(1)(A), (B), and (C) regarding regular contact with the child, progress in resolving the problems that led to the dependency, and demonstrated ability to complete the treatment plan and provide for the child's needs.

According to the social worker's report for that hearing, mother's progress and compliance with her reunification case plan was unsatisfactory because mother was terminated from the Alternatives to Domestic Violence program in May due to her failure

to regularly attend, and mother had not benefitted from the outpatient substance abuse program she attended from May to September of 2010, because mother had relapsed.

Mother does not address the social worker's comments, nor does she address the factors set out in section 366.21, subdivision (g)(1). Instead she argues in effect that by entering a residential treatment program, she was completing her reunification case plan. Mother's case plan required her to participate in an outpatient drug treatment program. She completed that program but then relapsed. Mother then made the decision, apparently on her own and without notifying DPSS, to enter residential treatment in Northern California, rather than remain on the waiting list for admission into a local treatment facility. We applaud mother's commitment to recovery and encourage her to continue that effort. However, at the time of the 12-month review hearing mother had been in residential treatment for 10 days. The juvenile court was not required to assume mother would succeed in this program, or to obtain information from the treatment program to determine the likelihood of mother's success.⁵ At that stage, the onus was on mother to make the showing necessary to extend reunification services beyond 12 months. Therefore, we must reject her claim that the juvenile court abused its discretion either in denying her request to continue the 12-month review hearing for some unspecified period of time, or by terminating her reunification services.

⁵ Mother faults the social worker for failing to advise the juvenile court that mother had entered residential treatment. There is nothing in the record that suggests the social worker knew before June 9, 2011, the date originally scheduled for the 12-month review hearing, that mother had entered the treatment program.

2.

DENIAL OF MODIFICATION PETITION

Mother filed a motion under section 388⁶ on October 7, 2011, asking the court to vacate the section 366.26 hearing and either return the children to her custody or extend mother's reunification services. In that petition, mother alleged that her circumstances had changed because on August 31, 2011, she completed a 90-day residential drug treatment program that also included a parenting program, individual counseling, and random drug testing. Mother also stated that since completing the program, she has been participating in outpatient treatment, attending a 12-step program, individual counseling, drug testing, and anger management. The juvenile court denied mother's request after first conducting a hearing at which mother testified. The court found that mother's circumstances were changing but had not yet changed, and therefore it was not in the best interests of the children to vacate the section 366.26 hearing or continue reunification services for mother.

We review the court's denial of a section 388 motion under the abuse of discretion of standard. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 ["This determination was committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established."].)

⁶ The motion is referred to in the juvenile court as a JV-180, or a 180, which is a reference to the Judicial Council number on the form.

Mother contends her circumstances had changed because she had completed the residential drug treatment program, and therefore the court abused its discretion by denying her section 388 petition.

Under section 388, a parent seeking change in a prior court order must allege both changed circumstances and that the proposed modification is in the best interests of the child. (§ 388.) We agree that mother demonstrated changed circumstances by showing she had completed a 90-day residential treatment program, and that in the six weeks since completing the program, mother was continuing treatment in an outpatient program as a result of which she had maintained her sobriety.

That showing, however, did not compel the juvenile court to grant mother's requested modification. The juvenile court may order the requested modification only if it is in the best interests of the children. In this case, the juvenile court's ruling can be viewed as a finding that mother failed to demonstrate the proposed modification was in the best interests of R.T. and S.H. given the enormous challenge posed by recovery from drug addiction.

We construe the court's statement that mother's circumstances had not changed as a finding that mother had not yet conquered her drug addiction, and therefore it was not in the best interests of two-year-old R.T. or 15-year-old S.H. to return to mother's custody. Mother had demonstrated a commitment to recovery, but she was not very far along in that process by the time she filed her section 388 motion. Mother had only tested her sobriety outside of her residential treatment program for six weeks at the time

the court considered her modification request. R.T. was six months old when removed from mother's custody, and DPSS had provided mother the statutory maximum 12 months of reunification services for R.T. by the time mother filed her modification request. Mother did not demonstrate in the juvenile court that the proposed modification was in R.T.'s best interest.

Mother also had received 12 months of reunification services with respect to S.H., and S.H. had expressly stated that she did not want to return to live with mother. Given S.H.'s strong statement of opposition, mother has failed to demonstrate how the proposed modification would be in the best interests of S.H. Because mother has not met her burden to demonstrate both changed circumstances and that the proposed modification is in the best interests of the children, we must conclude the juvenile court did not abuse its discretion by denying mother's motion under section 388.

DISPOSITION

The order terminating mother's parental rights to R.T. and S.H. is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.